UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSMAN OZSUSAMLAR, Plaintiff, -against- COURT STENOGRAPHER, ET AL. Defendants.	16-CV-6858 (CM) ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, incarcerated at FCI Bennettsville in South Carolina, is proceeding *pro se* and *in forma pauperis*, and he filed this action alleging violations of his due process rights. By order dated October 28, 2016, the Court directed Plaintiff to file an amended complaint. Plaintiff filed an amended complaint on December 27, 2016, and the Court has reviewed it. The action is dismissed for the reasons set forth below.

STANDARD OF REVIEW

The Court must dismiss a complaint, or portion thereof, that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b); *see Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007). While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

BACKGROUND

Plaintiff was convicted of conspiracy to commit murder-for-hire. *See United States v. Ozsusamlar*, No. 05-CR-1077 (PKL) (S.D.N.Y. Sept. 20. 2007), *aff'd*, 07-4119-cr (L), 07-5089-

cr (Con) (2d Cir. Oct. 20, 2009) (rejecting claims of insufficient evidence and prosecutorial misconduct). Plaintiff challenged the sentence under 28 U.S.C. § 2255, claiming that the Court lacked subject matter jurisdiction and was an improper venue, and that he received ineffective assistance from his trial and appellate counsel. The Court denied that motion. *See Ozsusamlar v. United States*, No. 10-CV-3455 (SAS), 2012 WL 4473286, at *1 (S.D.N.Y. Sept. 28, 2012), *recons. denied* (S.D.N.Y. Feb. 1, 2013), *aff'd*, 13-0882 (2d Cir. Sept. 13, 2013).

In his original complaint, Plaintiff asserted that a court reporter conspired with prosecutors to alter transcripts of his criminal proceedings. The court reporter was the sole defendant, and Plaintiff sought money damages. The Court construed Plaintiff's complaint as alleging constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In its October 28, 2016 order to amend, the Court explained that Plaintiff's complaint contained no facts suggesting that a federal actor had violated his constitutional rights or that there had been a conspiracy to violate his constitutional rights. In addition, the Court noted that any *Bivens* claim arising out of Plaintiff's criminal matter appeared to be untimely, and it invited Plaintiff to make any available equitable tolling arguments.

In his amended complaint, Plaintiff names the court reporter, and adds as defendants Prosecutor Miriam Elizabeth Rocah, FBI Case Agent Theresa McKeever, FBI Undercover Agent Melvin Bailey, and the United States. Plaintiff alleges that Defendants "work[ed] together to deny: him "an ad[]equate copy" of pretrial and trial transcripts, and that "[m]issing transcripts" prevented him from effectively raising claims of ineffective assistance of counsel and prosecutorial misconduct on collateral review. Plaintiff provided in somewhat broken English the following examples of alleged irregularities from a March 23, 2006 pretrial hearing:

> At 3/23/2006 first pre-trial hearing at the time criminal case no 05-cr-1077 (PKL) both Azsusamlar (father and son) asked judge for forensic test, then Judge Leisure asked prosecutor Miriam E. Rocah "any alternation"" Pg. 9. Prosecutor Rocah recording time between FBI agent Bailey and defendant Osman using late F-word. We removed the only F-word. Attorney Turner said the government already accepted alternation. This is changed in the transcript to F-bird. Also pg. 14 prosecutor Rocha we have 35 or 36 voice recording CD each cost is 6 or 8k dollars. We can not afford that forensic test fee. Attorney Osuna said we need just 4 voice recording CDs cost is less than 10k dollars is not in the transcript. Pg. 16 and 18 MCC voice recording between Mustafa and CW M. Malbrouk. We give exhibit voice record to attorney Turner very soon. Attorney Turner responds by we are glad to put in record and the transcript, this is not to show transcript.

Am. Compl. at 5.

DISCUSSION

A. Claims Under Bivens

Plaintiff's amended complaint fails to remedy the deficiencies discussed in the October 28, 2016 order to amend. In short summary, the amended complaint does not provide facts showing that defendants violated Plaintiff's constitutional rights or conspired to violate his constitutional rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).[1] Moreover, any *Bivens* claims arising out of Plaintiff's criminal proceedings are untimely. The Court provided Plaintiff with an opportunity to provide any basis for equitable tolling, and he failed to do so.

B. Mandamus Relief

This submission could also be construed as a petition for a writ of mandamus. The federal district courts have jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus relief is, however, a drastic remedy that should be used only in

[1] The order to amend noted that it was not clear whether the court reporter was a federal actor. Because Plaintiff otherwise fails to state a claim, the Court can dispose of this matter without resolving that question.

extraordinary circumstances. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). To obtain mandamus relief, a plaintiff must show that: "(1) no other adequate means [exist] to attain the relief he desires, (2) the party's right to . . . the [relief] is clear and indisputable, and (3) the [relief] is appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (internal quotation marks and citation omitted, first alteration in original). Plaintiff has not shown that any of these elements exist.

C. Request for Transcripts

There is no constitutional right to a free transcript in post-conviction proceedings. *See* 28 U.S.C. § 753(f); *United States v. MacCollom*, 426 U.S. 317 (1976). A plaintiff with a pending § 2255 motion may request a free copy of the record in his underlying criminal case pursuant to 28 U.S.C. § 2250; however, such a request may not be entertained by the district court until after a petition challenging the conviction has been filed. *United States v. Horvath*, 157 F. 3d 131 (2d Cir. 1998) (*per curiam*).

Because Plaintiff's previous § 2255 motion was decided on the merits, any subsequent § 2255 motion would be a second or successive motion. Before a second or successive § 2255 motion may be filed in the district court, authorization from the appropriate court of appeals is required. 28 U.S.C. § 2244(b)(3)(A). Plaintiff must therefore move in the United States Court of Appeals for the Second Circuit for permission to pursue such an application should he wish to do so.[2]

[2] Plaintiff would need to demonstrate that a motion to the Court of Appeals is based on newly discovered evidence or a new rule of constitutional law made retroactive by the Supreme Court. *See* 28 U.S.C. § 2255(h).

To obtain copies of documents from the Court's records for a fee, Plaintiff must contact the Records Management Office of the Court at 500 Pearl Street, Room 270, New York, N.Y. 10007. There is a statutory fee of fifty cents per page. Should Plaintiff file such a request, the file will be assessed and Plaintiff will be informed of the cost. Alternatively, if he has not already done so, Plaintiff may try to obtain transcripts from his former defense counsel.

CONCLUSION

The Clerk of Court is directed to mail a copy to Plaintiff, and note service on the docket. Plaintiff's amended complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962) (holding that an appellant demonstrates good faith when he seeks review of a nonfrivolous issue).

SO ORDERED.

Dated: January 20, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge